IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

In the matter between:

LEBOHANG URIEL MONYOBI **APPELLANT**

and

MINISTER OF JUSTICE & PRISONS	1ST RESPONDENT
MINISTER OF PUBLIC SERVICE	2ND RESPONDENT
PRINCIPAL SECRETARY FOR MINISTRY OF PUBLIC SERVICE	3RD RESPONDENT
THE ATTORNEY GENERAL	4TH RESPONDENT

CORAM:
BROWDE JA
KOTZé JA
VAN DEN HEEVER JA

JUDGMENT

VAN DEN HEEVER JA:

The appellant applied unsuccessfully to the High Court on Notice of Motion for an order declaring the termination of his employment by Government null and void, with consequential relief and costs. The present appeal lies against the order of Molai J dismissing that application with costs.

Undisputed facts may be summarised chronologically as follows.

The appellant was at all material times a Government employee, serving in the Ministry of Justice and Prisons and having been promoted to Prison Superintendent grade 11 as from the 15th of April, 1988. He was stationed at Maseru Central Prison at that stage. Since then he has been transferred many times. By letter dated 20 December 1989 he was told that he was transferred to Leribe, effective as from 2 January 1990. He pointed out to his superiors that the notice was impossibly short, and motivated a request that the transfer be postponed for

six months. By letter dated 2 January 1990 (Annexure C) the deferment sought was refused. The letter does not deal with the majority of the grounds on which he based his request, only with his allegation that he required medical attention available only in Maseru. That was dismissed with : "you have not annexed a medical certificate." The letter does accuse him of dishonesty, mismanagement, disobedience, and lack of administrative skills. (There is no suggestion in the papers that any disciplinary steps were ever taken against him, let alone proceedings instituted where he was given an opportunity to reply to formal charges. Nor, apparently, was his offer to reply, informally at a meeting, to "all the unpleasant allegations and accusations against me" which the writer had hitherto kept to himself, ever accepted.) He obeyed the transfer instruction, which was not withdrawn when he sent the requisite medical certificate, and went. He was barely there when on 29 March 1990 he was transferred back to Maseru "with immediate effect" (Annexure F). The next letter, dated 6 July 1990, (Annexure G) informed him that he had been transferred from Maseru Central Prison to Mohale's Hoek, again "with immediate effect". The appellant replied on 11 July, accepting that he was obliged to comply with the transfer, but pointing out that a relocation was always an expensive exercise and that he had been subjected to three transfers in six months. He asked on this occasion also that the transfer be deferred for six months, so as not to interfere with his wife's studies, alternatively that his family could stay on in the Government house in Maseru until he could find alternative accommodation for them; and detailed specific serious financial disadvantages resulting from his being shuttled back and forth in this fashion. Both his main and alternative requests were refused. The appellant accordingly went to Mohale's Hoek. A year later, by letter dated 10 July 1991, (annexure J) he was informed that he was retired from the Public Service as from 1st August 1991. Annexure J bears the letterhead of the Ministry of the Public Service, is signed by certain K Ralitsie, "FOR PRINCIPAL SECRETARY, MINISTRY OF THE PUBLIC SERVICE", and reads as follows:

"Dear Sir

RETIREMENT FROM THE SERVICE

I am to inform you that a decision has been taken to

> retire you from the Public Service under section 12(2) of the Public Service Order 1970 with effect from 1st August 1991 and your last day of service will be 31st July 1991.
>
> You will be paid cash in lieu of notice and all outstanding leave balances accrued to you during this leave year.
>
> I wish to extend to you the Government's appreciation of the services you rendered during your tenure of office".

The appellant consulted a lawyer, who on his behalf informed the Principal Secretary that the appellant had been given no hearing, elected to continue in Government employ, and tendered his services. On this occasion the Deputy Attorney General replied (annexure L):

> "Section 12(2) of the Public Service Order 1970 provides that a public officer may at any time after attaining the age of 45 years be required or permitted to retire. All that he is entitled to is one month's notice. According to Monyobi himself he was born on 5th February, 1940. Obviously he is now past 45 years of age. The Government is legally entitled to require him to retire from public service. There is no question of the principle of audi alteram partem having any relevance in this case. Mr. Monyobi was paid cash in lieu of notice and he has nothing to complain on that score. The issue whether he should be retained in public service after attaining the age of 45 is entirely a matter for Government"

The application was thereafter launched. Having set out the history outlined above, the appellant contended that his forced retirement was unreasonable and actuated by malice; that he was not given any hearing as required by the rules of natural justice; and that "the said letter of retirement was not written to me by the proper person who had authority to do so, therefore it is null and void". He again tendered his services to the Government.

The application was opposed. The answering affidavit was deposed to by the second respondent: the Minister responsible for the public service of Lesotho. He says that the proposal that the appellant be retired, emanated from the Ministry under which the appellant was working: therefore, Prisons. The Public Service Commission was consulted and gave an advice and made a recommendation in relation to the matter. Acting on the advice and recommendation, the second respondent *bona fide* decided that the appellant be retired on the ground that he had reached the

age of forty-five. He denied that he or the Public Service Commission had acted *mala fide* or unreasonably; and continued that "even if it were argued that the making of the proposal for retirement amounts to decision making" - which would in the deponent's view be erroneous - that proposal emanated from Prisons when the transfers of which he complained were "a thing of the past". They "cannot assist the [appellant] in his contention that he was treated maliciously by any of the officers who were involved in the decision-making process towards his retirement". The proposal in any event is in accordance with the law: they were entitled to make the proposal on the basis that the applicant had reached the age of forty-five. And he denied "that the letter of retirement was null and void and ... put the [appellant] to proof thereof".

This answering affidavit is supported in the first instance by a brief one by the third respondent to the effect that he had instructed Ralitsie to write annexure J, as the latter had done. A further affidavit was deposed to by Mr S.M Maliehe, the Director of Prisons. He does not deal with the fact that the three transfers in less than seven months could hardly have been more inconvenient had Prisons been intent upon inconveniencing the appellant: one move to be effected over the Christmas and New Year festive season, the next two "with immediate effect". He does motivate the moves themselves which the appellant was instructed to make, as follows:

1. Assistant Superintendent S. Mokaloba who commanded the Northern Division, was retiring from the public service. It was decided that the appellant should take over that Division, i.e. at Leribe. His place at Central Prison was taken by Superintendent T.A Khalieli.

2. In March the appellant was recalled to Maseru "on the basis of his own plea which he persistently made both before he went to the Northern Division at Leribe and even at the time he was already at Leribe". He was replaced in Leribe by Superintendent Khalieli.

3. Then a policy decision was taken that all Senior Superintendents would in future work at the Prison Headquarters in Maseru. Khalieli had just been promoted to Senior

Superintendent so he was recalled from Leribe; and the Senior in charge at Mohale's Hoek, Mr. Lebeta, was likewise transferred to headquarters and the appellant ordered to fill the gap created there as a result. All these transfers were effected under the authority of the Ministry of Justice and Prisons, and all were effected out of necessity and the particular needs of the Department as a whole.

The many moves of many staff members do not prima facie impress as arising out of good planning. The appellant's original plea for deferment of his move from Maseru was brusquely refused in that accusatory letter dated 2 January 1990, (Annexure C) before the deponent had sought - let alone obtained - authority from the Ministry to effect the transfer in question. He wrote seeking authority only on 3 January (annexure DP). We do not know when it was actually granted in response to that letter. There is no explanation why it was "necessary" to remove Mokaloba, allegedly on the verge of retirement, from Leribe, and post the appellant there. On 27 March 1990 (annexure DP 1) Prisons instructed the deponent as a matter of the "utmost urgency" to swop the appellant and Khalieli: the appellant from Leribe to Central Prison, and Khalieli the other way round: from Central to Leribe. The suggestion that the purpose was to accommodate the appellant, who had asked for deferment of his transfer away from Maseru, hardly accords with either the language of annexure C, or the sweeping statement that the transfers "were effected out of necessity and the particular needs at that point in time of the Department as a whole." Nor is there any attempt to explain why those needs changed so swiftly that the appellant had to be transferred again, to Mohale's Hoek this time, as a result of the policy decision and Lebeta's promotion. In any event the veracity of that allegation is questioned: the appellant was instructed on 6 July 1990 that he had been transferred "with immediate effect" (annexure DP 1). In his replying affidavit he says that Lebeta was promoted to the post of Senior Superintendent only on 16 November 1990; and also says that annexure DP has been altered for the purposes of the litigation by the insertion of the sentence, by means of a different typewriter: "Mr Mokaloba's service is about to

terminate soon". The printing of that short sentence does appear to the naked eye to be different from that of the rest of annexure DP, certainly in my copy of the record.

Whatever criticism one may voice against or questions one may ask about the opposing affidavits, however, the factual dispute - whether malice motivated the transfers of the appellant - cannot be decided in the appellant's favour on these papers. That dispute may well be irrelevant at this stage.

The court *a quo* dealt with the appellant's contention that his compulsory retirement was null and void as having been (purportedly) effected by the wrong person, as follows:

> "It is worth noting that annexure "A" (the letter of 21st April, 1988 by which the [appellant] was promoted to the post of Superintendent was also not written by the Principal Secretary for the Ministry of Public Service personally. It was written, on his behalf, by a certain L Mosoeunyane. The [appellant] did not then argue that his promotion was null and void because annexure "A" had not been written by the proper person, who had no authority to do so. By analogy the [appellant] could not, in my view, be heard to argue that his retirement was null and void simply because annexure "J" had been written by Khothatso Ralitsie, on the instructions, and/or on behalf, of the Principal Secretary for the Ministry of the Public Service"

The judgment held further that by virtue of the provisions of Section 12 (2) and (11) of the Public Service Order, 1970, he could claim no legitimate expectation of being permitted to remain employed beyond the age of 45, or a hearing before a decision to retire him was taken, or that the step taken was a nullity because he had not been given a month's notice, where he had been given wages in lieu of that. Therefore his application was dismissed with costs, as already stated.

It would be as well to set out at this stage some of the provisions of the 1970 Order, as amended, as it was in force at that time, which have a bearing on the dispute.

"Minister" is according to section 2(2), the Minister responsible for the public service.

Section 3 sets out the purpose of the Order: to develop and maintain a disciplined public service that will administer the

business of Lesotho efficiently and economically.

Section 6 (1) prescribes the punishments which may be imposed on an officer who has been proved to have committed a breach of discipline. They range from (a) removal from office by dismissal, through (b) removal from office by compulsory retirement or by permission or requirement to retire, (c) demotion and so on, down to (i) caution or reprimand

Section 10(1) sets out the general rules of conduct for public officers, 10(3) provides that

> "Nothing in this Part affects -
> (a)....
> (b) the operation of the Police Proclamation in respect of a member of the Lesotho Mounted Police subject to the provisions of sections 18(1) and 19(3) of this Order; or
> (c) the operation of the Prisons Proclamation in respect of a member of the Prison Services, subject to the provisions of section 18(2) and 19(3) of this Order".

Section 12 falls in Part 3 of the Order, which deals with "Retirement of Permanent Public Officers". It reads:

> "12. (1) Subject to the provisions of the other subsections of this section, a public officer shall have the right to retire from the public service, and shall be so retired, on attaining the age of fifty-five years.
> (2) A public officer may at, or at any time after attaining, the age of forty-five years, subject to one month's notice being given to him, be required or permitted to retire.
> (3) Subject to the provisions of the preceding subsection, a public officer shall have the right at any time before or after attaining the age of forty-five years to give written notification to the head of his department of his wish to be retired from the public service, and if he gives such notification he shall -
> (a) if such notification is given at least six calendar months prior to the date on which he attains the said age, be so retired on attaining that age; or
> (b) if such notification is not given at least six calendar months prior to the date on which he attains the said age, be so retired on the first day of the seventh month following the month in which the notification is received.
> (4) If in the opinion of the Minister it is in the public interest to retain a public officer in his post beyond the age at which under sub-section (1) or under sub-section (1) as modified by a general determination under sub-section (5) he shall be retired, he may if so willing, be so retained from time to time by the Minister for further periods which shall not exceed in the aggregate ten years.
> (5) The Minister may by Notice in the Gazette -

(a) determine an age greater than fifty-five years but not greater than sixty years for the purpose of retirement generally under sub-section (1); and
(b) determine an age greater than forty-five years but not greater than fifty-five years for the purpose of retirement generally under sub-section (3)

and on and after the date on which such a Notice comes into operation -

(i) a reference in sub-section (1) to the age of fifty-five years; and
(ii) a reference in sub-section (3) to the age of forty-five years,

is a reference in each case to the greater age respectively determined in that Notice.

(6) Every public officer is liable to be required or permitted to retire on the abolition of his office, on reduction of establishment and on grounds of redundancy.

(7) Every public officer is liable to be required or permitted to retire for the purpose of facilitating improvement in the organisation of the Ministry or department in which he serves, by which greater efficiency or economy may be effected.

(8) Every public officer is liable to be required or permitted to retire on medical evidence... that he is incapable by reason of infirmity... of exercising the powers or performing the duties of his office and that the infirmity is likely to be permanent.

(9) Every public officer is liable to be required or permitted to retire if, having regard to the conditions of the public service, the usefulness of the officer thereto and all the other circumstances of the case, his retirement is desirable in the public interest.

.....

(11) If an officer has been required or permitted to retire from the public service and he fails or refuses so to retire, he is deemed to have been retired from the public service."

The sub-sections referred to in section 10(3)(c), quoted above, provide -

"18(2) The power to appoint persons to hold or act in offices in the Prison Service (including the power to confirm appointments and to appoint by promotion) the power to exercise disciplinary control over persons holding or acting in such offices, and the power to interdict or remove such persons from office, shall be exercised in accordance with the provisions of the Lesotho Prisons Proclamation 1957 or any law amending or replacing it, notwithstanding anything to the contrary contained in this Order."

"19 (1)" (I paraphrase) The power to appoint and discipline public servants and "to interdict and remove such persons from office" is exercised after consultation with the Public Service Commission "except as otherwise provided in this section"

.....

"(3) The powers specified in subsection (1) shall be exercised without consultation with the Commission to the extent that the Police Proclamation and the Lesotho Prisons Proclamation, 1957, or any law amending or replacing either of them so provide, notwithstanding anything to the contrary contained in this Order"

And the Prisons Proclamation, as amended, provides that -
"2. The power to appoint a person to hold or act in the office of Director of Prisons, Superintendent or Assistant Superintendent...., the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office, shall be exercised by the Minister after consultation with the Public Service Commission...."

while section 3 grants these powers in regard to lower-ranking prison officers to the Director of Prisons who is moreover not obliged to consult the Public Service Commission.

Appellant's notice of appeal does not specifically raise the first point of law argued on behalf of the appellant before us: that the power to remove the appellant from office vested in the Minister of Justice and Prisons, not the Minister of the Public Service. The point was moreover elaborated for the first time in supplementary heads filed on his behalf. The grounds listed on which the appellant contested the whole of the judgment of the court *a quo*, are set out thus:

"1. The Learned Judge in the Court a quo erred and misdirected himself in holding that Appellant was not entitled to a hearing if retired in terms of section 12(2) of the Public Service Order, 1970.
2. The Learned Judge... erred in holding that Appellant did not have a legitimate expectation to remain in employment until he reached the retiring age of 55 years.
3. The Learned Judge... erred in holding that the provisions of Section 12(2) of the Public Service Order, 1970 had been complied with in retiring Appellant.
4. If it had properly advised itself, the Court a quo ought to have granted Appellant's Application"

In the court a quo the attack against the validity of the appellant's retirement on the grounds that the relevant letter had not been written by "the proper person who had authority to do so" was at best ambiguous, if it intended to rely for this contention on section 19(3); and from the terms of the judgment quoted above, it is clear that the point was not argued on that

basis. The argument advanced there was, as I understand it, that the wrong person within the public service department wrote the letter; not that the letter should have come from someone in an entirely different department. The sole debate, in other words, was whether the person who signed the letter had been authorised to do so; not whether the incorrect person/body had decided that the appellant should be retired.

The respondents objected to the point being taken now for the first time; arguing (by necessary implication) that it had not in fact been available to the appellant even in the first instance, where it was not spelled out in either the appellant's founding affidavit or his reply. Had it been, the respondents might have wished to set out circumstances under which the second respondent became involved in the matter, which could have refuted all suggestion of lack of authority.

It is unnecessary to decide whether it is open to the appellant on these papers and this notice of appeal, to raise the point for the first time before us, as he did. It is consequently also unnecessary to determine whether the point has merit, despite the difference in wording between section 12, in terms of which the second respondent purported to act, and section 19(1). The appellant has insisted *ab initio*, and persisted throughout, that he had a legitimate expectation of remaining in the employ of the Prisons Department until he reached the age of fifty five; which entitled him to a hearing before that expectation could be dashed.

Mr Makhete for the respondents argued that, on the strength of the maxim *expressio unius est exclusio alterius*, by necessary implication the only condition to which retirement at age forty-five is subject, is that the retiree be given a month's notice - in other words, that the injunction *audi alteram partem* has been excluded by the legislature. He referred to Sachs v Minister of Justice, 1934 A.D 11 at 38 and R v Ngwevela, 1954 (1) S.A. 123 (A). Since the appellant was retired, not dismissed, he suffered neither disgrace nor prejudice, retaining all his terminal benefits such as pension and gratuity. In regard to the

question of "disgrace", I mention in passing that the respondents' argument contains a *non sequitur:* compulsory retirement may be a punishment after an adverse finding in a disciplinary inquiry. And in regard to prejudice, although there is no evidence on this issue, pensions very seldom match salaries and common sense dictates the assumption that that is the position here too, otherwise the appellant would be seeking a disadvantage in these proceedings: the right to work, without any corresponding advantage to him.

The maxim on which Mr Makhete relied may afford useful guidance for construing a doubtful enactment, but is not a rigid rule of construction to be applied without reference to the context in which the matter expressed occurs. (Chotabai v Union Government and Another, 1911 AD 13, 28). In S.A. Estates and Finance Corporation v Commissioner for Inland Revenue, 1927 A.D. 230, de Villiers JA warned that the maxim "is one which must at all times be applied with great caution". The statute may contain other provisions which refute it, for example by indicating that what was expressly provided for, was mentioned *ex abundante cautela*. That appears clearly to be the position here. The second respondent has no unfettered discretion to hire and fire - or compel to retire - at will. Section 3 of Order 21 of 1970 already restricts him. So do sub-sections (6), (7),(8) and (9) of section 12, quoted above. I have little doubt that when he exercises his broad organisational powers under section 4, for example by transferring functions from one department to another, individual officers within the departments affected thereby have no right to query his decision. But different considerations apply when a decision is to be taken, for example, whether getting rid of a particular individual will lead to greater efficiency or economy within the department in which he serves (section 12(7)); or whether he should be compulsorily retired because it is alleged not only that the Government is not getting value for money by reason of an officer's mental or physical fragility, but that his condition is likely to be permanent (section 12(8). The appellant was a permanent employee in a pensionable public office. In Koatsa v The National University of Lesotho (Civil Appeal 15 of 1986) this Court held that an

employer in the public sector is obliged to give an employee such as the appellant a fair hearing before dismissing him with merely a month's notice (or, as here, by paying him a month's salary in lieu of notice). The public sector employer cannot act capriciously, arbitrarily or unfairly, as an employer in the private sector is entitled to do (provided he stays within the contractual terms agreed upon between the parties), in deciding to get rid of a particular officer.

Assuming that the second respondent was empowered to require the appellant to retire prematurely and that this was not a function of the first respondent, the allegation that the second respondent did so on the recommendation of the first respondent is insufficient, for obvious reasons. The first respondent cannot avoid the equitable procedure of himself according a fair hearing to the officer in question, by merely delegating the decision to his colleague in a different department. The latter still has to be satisfied either that the officer to be retired has been given an opportunity to contest a fully motivated recommendation, or himself to accord the man proposed to be retired such opportunity. If the recommendation is not motivated, the opportunity to challenge it will obviously not be a fair one.

No-one informed the court *a quo* what the recommendation on which the second respondent acted, was based on, if the second respondent was given reasons at all. In any event the second respondent does not depose that he was persuaded by good reasons that requiring the appellant to retire early would be in the interests of the Government. The second respondent regarded it as his right to get rid of the appellant as he did because of the provisions of section 12(2). Nor is there any suggestion on the papers that the appellant was given a fair hearing by anyone at any stage. The purported retirement was therefore doubly faulty: both inherently and procedurally.

It follows that the appeal must succeed.

In the matter of Koatsa, *supra*, this Court was unanimous as

to the law applicable. Cullinan JA did not concur in the order granted as a result of those conclusions of law. He held in a dissenting judgment that on the facts of that case, it would have been inequitable to reinstate the dismissed security guard who had appealed against a dismissal which suffered from only procedural impropriety. He would by reinstatement recover - years later - far more than he would have been able to recover by way of damages for wrongful dismissal.

In the present instance, the appellant reacted promptly to what he regarded as an unlawful dismissal. It is common cause that he was born on 5 February 1940 (annexure L). The delay in dealing with the matter more expeditiously was apparently due to an inability to obtain an earlier date for hearing: the papers were ready by the end of February 1992 but the matter set down (on 2 April) only for 4 June. After judgment was deliverwed on 18 June, notice of appeal was timeously lodged. Delay in preparing the record was condoned since the original record had gone astray. Prima facie, where the appellant when compelled to retire was not a young man who could notionally have carved out a new career for himself once he came to terms with having compulsorily left his former career, it seems unlikely that an action for damages would result in a smaller quantum than an order of re-instatement would have produced, had that been granted by the court *a quo*. There is no suggestion that the appellant has been involved in any other remunerated occupation since 31 July 1991. The order I propose accepts the reality that time has passed by since the appellant sought reinstatement which was incorrectly refused.

In the result, the appeal succeeds, with costs.

The order of the court *a quo* is set aside and replaced with the following:

"1. The termination of Applicant's employment by the third respondent is declared to have been null and void.

2. The third respondent is directed to pay Applicant's emoluments with effect from the date of dismissal until 5 February 1995, as though he had been reinstated and employed until then reaching the statutory retiring age of fifty-five.

3. The respondents are directed to pay the Applicant's costs in the application"

L.van den Heever
Judge of Appeal

I agree

J Browde
Judge of Appeal

I agree

G.P. Kotzé
Judge of Appeal.

Delivered at Maseru this 2nd day of April, 1997.